



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 30, 2005

Mr. David P. Brown  
Minton & Brown, P.L.L.C.  
P.O. Box 1688  
Henderson, Texas 75653-1688

OR2005-07938

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 230446.

The Henderson Police Department (the "department"), which you represent, received a request for information relating to a shooting that occurred on March 13, 2005 at a specific location and "all emails sent and received by [named department personnel] from 0100 hrs 3/13/05 until 0800 hrs 04/11/05[.]" You state that you have no responsive information regarding "MCT/MDT traffic" and many of the e-mails.<sup>1</sup> You also state that the department is unable to access a portion of the requested information.<sup>2</sup> You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.108, and

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<sup>1</sup>We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>The department believes certain information contained in computers may be responsive to the request. You state that two named officers are on vacation and "are not available to furnish their password to get into their computers." You also state that another officer is no longer employed by the department. You therefore claim that the department is unable to access the information. However, to the extent that such responsive information existed upon the department's receipt of the request for information, the department must release this information to the requestor. See Gov't Code §§ 552.006, .301, .302; see also Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

552.137 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>4</sup>

Initially, you acknowledge, and we agree, that the department has not sought an open records decision from this office with regard to the submitted information within the ten-day statutory deadline imposed by section 552.301(b) of the Government Code, nor did the department submit the information required by section 552.301(e) to this office within the fifteen-day period. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977).

Sections 552.103 and 552.108 of the Government Code are discretionary in nature; they serve only to protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). A discretionary exception does not constitute a compelling reason to withhold information for purposes of section 552.302. In failing to comply with section 552.301, the department has waived its claim under sections 552.103 and 552.108. We note, however, that the need of another governmental body to withhold information under section 552.108 can provide a compelling reason to withhold information. *See* Open Records Decision No. 586 at 3 (1991). In this instance, you inform us that the Rusk County Attorney's Office (the "county attorney") "has the duties also of a district attorney." The county attorney has informed our

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<sup>3</sup>The department initially claimed that some of the submitted e-mails were excepted from public disclosure under section 552.101 in conjunction with federal law. You subsequently withdrew your arguments under section 552.101.

<sup>4</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

office of its law enforcement interests in the submitted information. Accordingly, we will address section 552.108 for the submitted information. Furthermore, sections 552.101 and 552.137 of the Government Code can provide compelling reasons to overcome this presumption; therefore, we will also consider whether either of these sections require you to withhold the submitted information.

Section 552.108 of the Government Code states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where an agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

The county attorney states that a portion of the submitted information pertains to a pending criminal prosecution being handled by his office, and he objects to its release. Based upon his representations and our review, we determine that release of the information pertaining to the case of *State of Texas v. Michael Allan Loun*, Cause No. CR05-140 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore conclude that section 552.108(a)(1) is applicable to this portion of the submitted information. However, neither the department nor the county attorney has indicated the remaining submitted information pertains to any criminal case. Therefore, the remaining submitted information may not be withheld under section 552.108.

We next note that some of the submitted information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). The department must withhold the information we have marked under section 552.117(a)(2).

We note that the submitted audio recordings contain Texas-issued motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state."<sup>5</sup> Gov't Code § 552.130. Accordingly, the department must withhold the Texas-issued motor vehicle record information from the submitted recordings. *See* Gov't Code § 552.130. The remaining portions of the recordings must be released.

You note that the submitted information includes e-mail addresses of members of the public. Section 552.137 of the Government Code provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
  - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
  - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
  - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
  - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. E-mail addresses that are encompassed by subsection 552.137(c) are not excepted from disclosure under section 552.137. Section 552.137 does not apply to the types of e-mail addresses listed in section 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Based on our review of the submitted information, we find that several of the submitted e-mail addresses are encompassed by subsection 552.137(c) or are otherwise not subject to section 552.137. Accordingly, we conclude that these e-mail address are not excepted from disclosure under section 552.137 of the Government Code and must be released. Concerning the remaining e-mail addresses, you state that no member of the public has affirmatively consented to their release. The department must, therefore, withhold the e-mail addresses that we have marked under section 552.137.

Finally, we note that a portion of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department may withhold the portions of the submitted information pertaining to *State of Texas v. Michael Allan Loun*, Cause No. CR05-140 under section 552.108(a)(1) of the Government Code. The personal information of licensed peace officers employed by the department must be withheld under section 552.117(a)(2) of the Government Code. The department must withhold the portions of the submitted audio recordings that reveal Texas-issued motor vehicle record information. The department must withhold the e-mail addresses of members of the public that we have marked under section 552.137 of the Government Code. The portion of the submitted information that is protected under copyright must be released only in accordance with copyright law. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

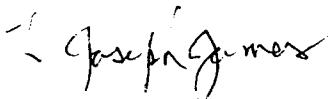
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Joseph James".

L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 230446

Enc. Submitted documents

c: Ms. Julie Harris  
802 North Floyd Road  
Richardson, Texas 75080  
(w/o enclosures)